

U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS 425 Eye Street N.W. ULLB, 3rd Floor Washington, D.C. 20536



FILE:

Office: Vienna

Date:

FEB 07 2000

IN RE: Applicant:

APPLICATION:

Application for Waiver of Grounds of Inadmissibility under § 212(a)(9)(B)(v) of the Immigration and Nationality Act, 8 U.S.C.

1182(a)(9)(B)(v)

IN BEHALF OF APPLICANT:

Self-represented





INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER, EXAMINATIONS

Terrance M. O'Reilly, Director Administrative Appeals Office

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DISCUSSION: The waiver application was denied by the Officer in Charge, Vienna, Austria, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The applicant is a native and citizen of Ukraine who entered the United States on a commercial airline from the Bahamas on June 13, 1996 using the birth certificate and driver's license of her husband's sister. She remained in the United States without a lawful admission or parole until March 10, 1999. The applicant was found to be inadmissible to the United States by a consular officer under § 212(a)(9)(B)(i)(II) of the Immigration and Nationality Act, (the Act), 8 U.S.C. 1182(a)(9)(B)(i)(II), for having been unlawfully present in the United States for a period of more than 1 year. The applicant married a United States citizen in Hawaii on January 16, 1998 and is the beneficiary of an approved immediate relative visa petition. The applicant seeks the above waiver in order to return to the United States and reside with her spouse.

The officer in charge reviewed the record and determined that the applicant had failed to establish that extreme hardship would be imposed upon a qualifying relative.

On appeal, the applicant submitted a psychologist's report dated August 17, 1999 in which the applicant was interviewed in person and her husband was interviewed by telephone on August 13, 1999. Dr. determined that the forced separation from his wife imposes extreme hardship on the applicant's spouse as evidenced by the wrathful and indignant letter he wrote to the Service which is completely opposite to his usual behavior. Dr. indicates that such hardship can result in unfavorable consequences for both parties.

The record reflects that the applicant met her future husband in Russia in August 1995 after a period of correspondence. The applicant's husband attempted to obtain a K-1 visa for her but encountered "various problems" in the process. They gave up trying to get a visa and planned to meet in the Bahamas where the applicant's husband helped her enter the United States illegally. The record is silent as to why the consular officer failed to find the applicant inadmissible under § 212(a)(6)(C)(i) of the Act, 8 U.S.C. 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or misrepresentation.

Issues of inadmissibility are to be determined by the consular officer when an alien applies for a visa abroad. This proceeding must be limited to the issue of whether or not the applicant meets the statutory and discretionary requirements necessary for the inadmissibility ground to be waived. 22 C.F.R. 42.81 contains the necessary procedures for overcoming the refusal of an immigrant visa by a consular officer.

Section 212(a)(9)(B) ALIENS UNLAWFULLY PRESENT .-

- (i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-
 - (I) was unlawfully present in the United States for a period of more than 180 days but less than 1 year, voluntarily departed the United States (whether or not pursuant to § 244(e) [1254]) prior to the commencement of proceedings under § 235(b)(1) or § 240 [1229a], and again seeks admission within 3 years of the date of such alien's departure or removal, is inadmissible.
 - (II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure or removal from the United states, is inadmissible.
- (v) WAIVER.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Section 212(a)(9)(B) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). An appeal must be decided according to the law as it exists on the date it is before the appellate body. See <u>Bradley v. Richmond School Board</u>, 416 U.S. 696, 710-1 (1974); <u>Matter of Soriano</u>, Interim Decision 3289 (BIA 1996). In the absence of explicit statutory direction, an applicant's eligibility is determined under the statute in effect at the time his or her application is finally considered. If an amendment makes the statute more restrictive after the application is filed, the eligibility is determined under the terms of the amendment. Conversely, if the amendment makes the statue more generous, the application must be considered by more generous terms. <u>Matter of George</u>, 11 I&N Dec. 419 (BIA 1965); <u>Matter of Leveque</u>, 12 I&N Dec. 633 (BIA 1968).

The Board has held that extreme hardship is not a definable term of fixed and inflexible meaning, and that the elements to establish extreme hardship are dependent upon the facts and circumstances of each case. These factors should be viewed in light of the Board's statement that a restrictive view of extreme hardship is not mandated either by the Supreme Court or by its own case law. See Matter of L-O-G-, Interim Decision 3281 (BIA 1996).

It is noted that the requirements to establish extreme hardship in the present waiver proceedings under § 212(a)(9)(B)(v) of the Act do not include a showing of hardship to the alien as did former cases involving suspension of deportation or present cases involving battered spouses. Present waiver proceedings require a showing of extreme hardship to the citizen or lawfully resident spouse or parent of such alien. This requirement is identical to the extreme hardship requirement stipulated in the amended fraud waiver proceedings under § 212(i) of the Act, 8 U.S.C. 1182(i). Therefore, it is deemed to be more appropriate to apply the meaning of the term "extreme hardship" as it is used in fraud waiver proceedings than to apply the meaning as it was used in former suspension of deportation cases.

In <u>Matter of Cervantes-Gonzalez</u>, Interim Decision 3380 (BIA 1999), the Board recently stipulated that the factors deemed relevant in determining whether an alien has established "extreme hardship" in waiver proceedings under § 212(i) of the Act include, but are not limited to, the following: (1) the presence of a lawful permanent resident or United States citizen spouse or parent in this country; (2) the qualifying relative's family ties outside the United States; (3) the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative's ties in such countries; (4) the financial impact of departure from this country; (5) and finally, significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate.

It is also noted that the Ninth Circuit Court of Appeals in Carnalla-Muñoz v. INS, 627 F.2d 1004 (9th Cir. 1980), held that an after-acquired equity (referred to as an after-acquired family tie in Matter of Tijam, Interim Decision 3372 (BIA 1998)) need not be accorded great weight by the district director in considering discretionary weight. The applicant in the present matter illegally entered the United States in June 1996 and married her spouse in January 1998. She now seeks relief based on that after-acquired equity. However, as previously noted, a consideration of the Attorney General's discretion is applicable only after extreme hardship has been established.

A review of the documentation in the record, when considered in its totality, reflects that the applicant has failed to show that the qualifying relative would suffer extreme hardship over and above the normal economic and social disruptions involved in the removal of a family member. Having found the applicant statutorily ineligible for relief, no purpose would be served in discussing whether she merits a waiver as a matter of discretion.

A review of the documentation in the record, when considered in its totality, fails to establish the existence of hardship to the applicant's spouse (the only qualifying relative) caused by separation that reaches the level of extreme as envisioned by Congress if the applicant is not allowed to return to the United States.

In proceedings for application for waiver of grounds of inadmissibility under § 212(a)(9)(B)(v) of the Act, the burden of proving eligibility remains entirely with the applicant. See Matter of T--S--Y--, 7 I&N Dec. 582 (BIA 1957). Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.